IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3980 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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S H BHAMBHANI - Petitioner
Versus
STATE OF GUJARAT & 7 - Respondents

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Appearance :
MR PV HATHI for Petitioner.
MR MUKESH A.PATEL, ASSTT.GOVERNMENT PLEADER for Respondent No.1
MS MAHROOK KERAVALA, for Respondent : 2.
MR NIKHIL S KARIEL for Respondents : 3 - 4.
RULE SERVED for Respondent(s) : 5 - 7.
MR SURESH M SHAH for Respondent : 8,

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL

Date : 07/04/2006

ORAL JUDGMENT

By means of filing this petition under Article 226 of the Constitution, the petitioner has prayed to issue a writ of mandamus, or a writ of certiorari, or any other appropriate writ or order to quash order dated June 10, 1991 passed by the Commissioner, Rajkot Municipal Corporation appointing the respondent Nos.3 & 4 as Deputy City Engineers. The petitioner has also prayed to declare that Paragraph-6 of the proposed Rules relating to recruitment to the post of Deputy City Engineer (Civil) is illegal, void and of no effect whatsoever. The petitioner has further prayed to direct the Rajkot Municipal Corporation to promote him with effect from the date when his juniors i.e. Respondent Nos.3 & 4 were promoted to the post of Deputy City Engineers and/or to give him deemed date of promotion on the post of Deputy City Engineer with all consequential benefits like re-fixation/difference of pay, arrears of pay and pension with 15% interest within the time to be specified by the Court. The petitioner has also

prayed to declare that the appointments of the respondent Nos.3 & 4 as Deputy City Engineers (Civil) are illegal, improper and not made in bona fide exercise of powers.

2. The petitioner is a Diploma-Holder in Civil Engineering. He was appointed by way of direct recruitment as Deputy Executive Engineer on April 13, 1971 by the Municipal Corporation, Rajkot. According to him, in the seniority list of Deputy Executive Engineers, who were either promotees or direct recruits as Deputy Executive Engineers, his name figures at serial No.3 and he is eligible for promotion to the next post of Deputy City Engineer.

3. On May 1, 1991, the Commissioner of Municipal Corporation made a proposal to the Standing Committee and the Rules Committee to frame recruitment Rules for the post of Deputy City Engineers. The Standing Committee of Municipal Corporation, in its meeting dated May 8, 1991, decided to adopt the proposed Rules by its Resolution No.145. By the proposed

Rules, ratio of 3:1 between Degree-Holders and Diploma-Holders was provided for making appointment to the post of Deputy City Engineer. The Standing Committee decided that its decision be placed before the General Body for its approval. On May 10, 1991, the Rules Committee approved Resolution No.145 passed by the Standing Committee. The Commissioner of Municipal Corporation, on the same day, issued orders of appointment of five Deputy City Engineers from the Cadre of Deputy Executive Engineer in anticipation of approval of the Rules by the General Board as well as by the State Government, pursuant to which the respondent Nos.3 & 4 were also appointed as Deputy City Engineers. On June 7, 1991, an advertisement was issued in the local newspapers mentioning the agenda for the General Board meeting of the Corporation to be held on June 19, 1991, where one of the items of the agenda was consideration of the Rules adopted by the Standing Committee of the Corporation. On June 19, 1991, the meeting of General Body of the Corporation was convened wherein the decision of the Standing Committee was approved and the proposed

Rules were forwarded to the State Government for its approval. The case of the petitioner is that the order dated June 10, 1991 promoting the respondent Nos.3 & 4 is against criteria of seniority-cum-merits and the same is liable to be set aside, as it has been passed on extraneous and irrelevant considerations. The petitioner has stated in the petition that the promotion of the respondent Nos.3 & 4 is arbitrary, inasmuch as seniority of Deputy Executive Engineers was overlooked, not on any valid ground, but only with a view to giving them undue benefit, as they are close relatives of the Chairman of Planning Committee and the then Mayor of the Municipal Corporation and, therefore, their appointments are liable to be set aside. It is averred by the petitioners that the appointments of the respondent Nos.3 & 4 made on June 10, 1991 subject to the provisions of recruitment rules, which were newly framed, are ineffective, as the Rules are not approved by the State Government within reasonable time. Under the circumstances, the petitioner has filed the instant petition and claimed

reliefs to which reference is made earlier.

4. On service of notice of rule, the respondent No.3 has filed affidavit-in-reply controverting the averments made in the petition. So also, the respondent No.4 has filed affidavit-in-reply controverting the averments made in the petition. The petitioner has filed rejoinder to the affidavit-in-replies filed by the respondent Nos.3 & 4 reiterating what is stated by him in the petition.

5. This Court has heard Mr.P.V.Hathi, learned counsel for the petitioner, Ms.Mahrook Keravala, learned counsel appearing for the Corporation, Mr.S.M.Shah, learned counsel appearing for the respondent No.8 and Mr.Mukesh A.Patel, learned Assistant Government Pleader appearing for the respondent No.1, at length and in great detail, as well as considered the documents forming part of the petition. Though served, none of the other respondents has either appeared in person or through a lawyer.

6. The plea that on the basis of Draft Rules, respondent Nos.3 & 4 could not have been promoted to the post of Deputy Executive Engineers, is devoid of merits. In **High Court of Gujarat & Anr. vs. Gujarat Kishan Mazdoor Panchayat & Ors. (2003)4 SCC 712**, under Rules 2 & 3 of the Draft Recruitment Rules framed by the High Court, which were pending approval of the Government, appointment on the post of President of Industrial Court was made. That was challenged before the High Court by way of filing petition under Article 226 of the Constitution. The petition was allowed by Full Bench of the High Court. One of the grounds, which weighed with the Full Bench, was that no action could have been taken on the basis of Draft Rules which were pending approval of the Government. While setting aside the decision of the Full Bench of the Gujarat High Court, the Supreme Court has held that appointment can validly be made under the rules even in their draft stage if there is a clear intention of the Government to enforce them in the near future.

Applying the principle laid down in the above-quoted decision of the Supreme Court to the facts of the case, this Court finds that the proposal made by Rajkot Municipal Corporation to the Government to accord approval to the Draft Rules, is not turned down. Therefore, the impugned order promoting the respondent Nos.3 & 4 to the post of Deputy Executive Engineers cannot be regarded as illegal.

7. Further, from the material made available to the Court and submissions made, it is clear that at the relevant time when the promotions were being made to the post of Deputy Executive Engineers, there were no statutory rules in operation. In that view of the matter, it was always open to the respondent No.2 to provide for criteria and other relevant provisions for promotion to the said posts by way of issuing executive instructions. The Corporation by adopting a resolution decided to fill up the posts in question by promotion by providing ratio of 3:1 between the degree-holders and diploma-holders and thereafter promoted the respondent Nos.3 & 4 to the post of

Deputy Executive Engineers, which cannot be regarded as illegal or erroneous or contrary to the provisions of Article 14 of the Constitution.

8. The plea that degree-holders and diploma-holders could not have been treated differently for the purpose of promotion to the post of Deputy Executive Engineers and, therefore, the impugned order is liable to be set aside, has no substance. In **the State of Jammu & Kashmir v. Triloki Nath Khosa & Ors. AIR 1974 SC 1**, the persons appointed directly and by promotion were integrated into a common class of Assistant Engineer. For the purposes of promotion to the cadre of Executive Engineer, they were classified on the basis of educational qualifications, The Supreme Court has held that Rules providing that graduates shall be eligible for such promotion to the exclusion of diploma-holders, do not violate Articles 14 & 16 of the Constitution. Again, in **Shamkant Narayan Deshpande v. Maharashtra Industrial Development Corporation, AIR 1993 SC 1173,** it is held that for promotion to the post of Superintending

Engineer, classification of degree-holders and diploma-holders is not violative of Articles 14 & 16 of the Constitution. What is laid down in the said decision is that classification made by the Corporation by merely passing a resolution would not be illegal and change in service condition by passing resolution is permissible. Similar view is expressed by the Supreme Court in **Assam State Electricity Board and others V. Gajendra Nath Pathak and another, AIR 1997 SC 3385 and Rajasthan Staff Electricity Board Accountants' Association, Jaipur V. Rajasthan State Electricity Board and another, AIR 1997 SC 882**. Applying the principles laid down by the Supreme Court in the above-quoted decisions to the facts of the case on hand, this Court finds that the classification made by Rajkot Municipal Corporation between the degree-holders and the diploma-holders for promotion to the post of Deputy Executive Engineers is perfectly valid and is not violative of the principles laid down in Articles 14 & 16 of the Constitution.

9. The last plea that the action is mala fide and, therefore, reliefs claimed in the petition should be granted is merely stated to be rejected. What is maintained by the petitioner in the petition is that the respondent Nos.3 & 4 were promoted to the post of Deputy Executive Engineers because the respondent No.3 is brother-in-law of Shri Mansukhbhai Patel, who was Chairman of Standing Committee of the Corporation, whereas the respondent No.4 was promoted because he is brother-in-law of Shri Vajubhai Vala, who was Mayor of Rajkot Municipal Corporation and, therefore, their appointments should be set aside. Since the allegations of mala fides are likely to have serious consequences, sufficient particulars and cogent material making out a prima-facie case should have been placed by the petitioner before the Court because burden of proving mala fides is on the persons making allegations and the burden is very heavy. Charge of mala fide against Public Bodies and authorities is more easily made than made out and it is the last refuge of a losing litigant. In order to substantiate charge of mala fides, the petitioner

should have impleaded Mr. Mansukhbhai Patel, who was then Chairman of Planning Committee of the Corporation and Mr. Vajubhai Vala, who was then Mayor of the Corporation. However, admittedly, the petitioner has not impleaded them as respondents in the petition. It is well settled that persons against whom mala fides are alleged should be joined as parties and given opportunity to meet the charge of malafies and if they are not joined, averments of mala fides should be ignored by the Court. On the facts and in the circumstances of the case, this Court is of the opinion that the petitioner has failed to substantiate the charge of mala fides levelled by him against Mr. Mansukhbhai Patel, who was then Chairman of Planning Committee of the Corporation and Mr. Vajubhai Vala, who was then Mayor of the Corporation and no relief can be granted to the petitioner on the basis that action of promoting the respondent Nos.3 & 4 to the post of Deputy Executive Engineers was mala fide.

The net result of the above discussion is that

there is no merits in the petition and the petition is liable to be dismissed.

For the foregoing reasons, the petition fails and is dismissed. Rule is discharged. Ad-interim relief granted earlier is hereby vacated. There shall be no order as to costs.

[J.M.PANCHAL,J.]

(patel)